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SUPREME COURT, U.S.

No. 82 6284

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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LINWOOD E. BRILEY,

Petitioner,

versus

J. P. MITCHELL,

Respondent.

---

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

---

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## QUESTIONS PRESENTED

I. Whether Petitioner's sentence of death is unconstitutional where there is no clear indication in the record as to which aggravating circumstance[s] was [were] found by which jurors, making a reliable review of the decision impossible, and where the jurors were instructed that they did not have to agree as to the aggravating circumstance[s]?

II. Whether, because at least one of the two criteria found by some or all of the jurors is invalid and unconstitutional as applied to Petitioner, Petitioner's sentence of death is unconstitutional?

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## OPINIONS BELOW

The Supreme Court of Virginia denied without opinion both Petitioner's Petition for Appeal and Petition for Rehearing of the dismissal by the Circuit Court for the City of Richmond of Petitioner's state post-conviction proceeding. The opinion of the Circuit Court of the City of Richmond dismissing the state post-conviction proceeding is found in two parts: 1) its Order dated December 18, 1981; and 2) its pronouncements from the bench incorporated into said Order, both of which are appended hereto.

The opinion of the Supreme Court of Virginia upon Petitioner's direct appeal from his conviction and death sentence is reported at Briley v. Commonwealth, 221 Va. 532 (1980), cert. denied, 451 U.S. 1031 (1981).

## JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3), in that Petitioner claims that his sentence of death violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution and in that the validity of a relevant portion of Virginia's death penalty system is drawn into question as being repugnant to the Eighth and Fourteenth Amendments as interpreted by this Court. The order of which review is sought is the Order of the Virginia Supreme Court denying Petitioner's Petition for Rehearing, which Petition was denied by Order dated December 3, 1982.

## CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, ...; nor shall any person ... be deprived of life, liberty, or property, without due process of law; ...

UNITED STATES CONSTITUTION, AMENDMENT VIII.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1.

> ...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VIRGINIA CONSTITUTION, ARTICLE I, SECTION 8.

> Criminal prosecutions.--That in criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, and to call for evidence in his favor, and he shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty...

VIRGINIA CODE ANNOTATED §19.2-264.4(C) (1982 Cum. Supp.).

The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

VIRGINIA CODE ANNOTATED §18.2-32 (1982 Repl. Vol.).

First ... degree murder defined; punishment.--Murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction, except as provided in §18.2-31, is murder of the first degree, punishable as a Class 2 felony.

...

VIRGINIA CODE ANNOTATED §18.2-31 (1982 Repl. Vol.).

Capital murder, defined; punishment.--The following offenses shall constitute capital murder, punishable as a Class 1 felony:

(a) The willful, deliberate and premeditated killing of any person in the commission of abduction, as defined in §18.2-48, when such abduction was committed with the intent to extort money, or a procuniering benefit;

(b) The willful, deliberate and premeditated killing of any person by another for hire;

(c) The willful, deliberate and premeditated killing of any person by an inmate in a penal institution as defined in §53.1-1, or while in the custody of an employee thereof;

(d) The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon;

(e) The willful, deliberate and premeditated killing of a person in the commission of, or subsequent to, rape; and

(f) The willful, deliberate and premeditated killing of a law-enforcement officer as defined in §9-108.1H when such killing is for the purpose of interfering with the performance of his official duties

...

VIRGINIA CODE ANNOTATED §18.2-10 (1982 Repl. Vol.).

The authorized punishments for a conviction of a felony are:

(a) For Class 1 felonies, death, or imprisonment for life.

(b) For Class 2 felonies, imprisonment for life or for any term not less than twenty years.

...

VIRGINIA CODE ANNOTATED §17-110.1 (1982 Repl. Vol.).

Review of death sentence.--

...

c. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

...

RULES OF THE SUPREME COURT OF VIRGINIA, RULE 3A:24.

(a) Return--In all criminal prosecutions, the verdict shall be unanimous, in writing...

## STATEMENT OF THE CASE

### Procedural Posture

Petitioner's sentence of death was recommended by his jury on February 22, 1980, and was imposed by the trial court on March 10, 1980. His conviction and sentence were appealed to the Supreme Court of Virginia. See Briley v. Commonwealth, 221 Va. 532 (1980), cert. denied, 451 U.S. 1031 (1981). As a part of Virginia's death penalty sentencing scheme, §17-110.1(c) requires the Supreme Court of Virginia to review independently all aspects of the sentencing phase where the penalty of death has been recommended, to assure freedom from

ambiguity, caprice, arbitrariness, or other unfair aspects in the imposition of the penalty of death. Thus, the questions presented to this Court for review were necessarily charged to the review by the Supreme Court of Virginia on direct appeal. However, as reflected in the opinion by the Supreme Court of Virginia of Petitioner's direct appeal, these questions were not actually addressed by the Supreme Court of Virginia.

These questions were then specifically raised by Petitioner's Petition for Writ of Habeas Corpus filed October 15, 1981, with the Circuit Court for the City of Richmond (hereinafter also referred to as habeas court), specifically in Claim I, Paragraphs B,C,D, and E; Claim II, Paragraph I; Claim III,Paragraphs Q,R, and S. A copy of the pertinent portions of that Petition are appended hereto. The Circuit Court by Order of November 18, entered December 15, agreed to entertain all of these claims except for Claim I, Paragraphs B and C, and Claim III, Paragraphs Q and S, which, the habeas court ruled, had already been ruled upon by the Supreme Court of Virginia. A copy of said Order is appended hereto. On December 15, 1981, a plenary hearing was held at which Petitioner sought to introduce, among other evidentiary matters, the trial transcript. This was refused by the habeas court. By Order dated December 18, entered December 21, the habeas court dismissed Petitioner's Petition. A copy of this Order is appended hereto. This Order fails specifically to address the claims which are presented to this Court for review. Although the Order refers to pronouncements from the bench, these pronouncements likewise fail to address the specific claims before the habeas court which are presented to this Court for review. A copy of the pronouncements from the bench are appended hereto.

Petitioner timely noted his appeal to the Supreme Court of Virginia of the dismissal of his Petition for Writ of Habeas Corpus and timely filed his Petition for Appeal. Petitioner further moved to have the trial transcript, which the clerk of the habeas court erroneously did not forward to the Supreme Court of Virginia as either rejected or accepted, and which was necessary for review of the issues, made a part of the record on appeal. Because this motion was not granted during the time allowed for Petitioner to file his Petition for Appeal, Petitioner was unable to rely on matters reflected in the trial transcript in his Petition for Appeal. The trial transcript was, however, subsequently made a part of the record on appeal by Order of the Supreme Court of Virginia. Petitioner's Petition for Appeal was denied October 5, 1982, a copy of which Order is appended hereto. Petitioner timely filed a Petition for Rehearing, in light of the belated inclusion in the record of the trial court transcript, and the questions presented to this Court for review were presented to the Supreme Court of Virginia by said Petition for Rehearing by Assignments of Error Nos. 1 and 10 and Questions Presented Nos. 1 and 9. A copy of the portion of the Petition for Rehearing in which these Assignments of Error and Questions Presented appear is appended hereto. The Petition for Rehearing was denied on December 3, 1982. A copy of that Order is appended hereto.

## Statement of Facts

This case arises out of the death of John Gallaher whose body was discovered in Richmond, Virginia. He had been shot once in the back. Petitioner Linwood E. Briley was arrested and charged with

capital murder, §18.2-31(d), to-wit: The willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon. He was convicted by a jury on February 21, 1980, and was sentenced to death on February 22, 1980.

Petitioner has always denied his involvement in the death of the victim and testified on his own behalf. However, the evidence presented by the Commonwealth, chief of which was testimony by an alleged accomplice named Meekins, when viewed in a light most favorable to the Commonwealth, was as follows:

On September 14, 1979, Gallaher was playing with a band at a location known as The Log Cabin. At about 11:20 p.m., he left the back of The Log Cabin and walked to bushes near an alley behind. Petitioner, along with two of Petitioner's brothers and Meekins, came up from behind with a shotgun to "mug" the victim, and told Gallaher to lie down. Petitioner then took Gallaher's billfold and car keys and, while Meekins was looking for Gallaher's car, also took Gallaher's ring and watch. There was no evidence of physical harm to Gallaher. Gallaher was then placed in the back seat of his own car. Petitioner, his two brothers, and Meekins then drove to an island in the James River located within the City of Richmond, pushed and/or pulled Gallaher from the car and Petitioner shot him once with a rifle as Gallaher was starting to stand up outside the car.

Gallaher died instantly. There was no further physical contact with or injury inflicted upon the victim. Petitioner, his brothers, and Meekins drove the car to a spot where the car was partially

stripped and left.

At the sentencing stage, the trial court instructed the jurors that they had to find beyond a reasonable doubt either: 1) that Petitioner would probably commit further criminal acts of violence that would constitute a continuing serious threat to society; or 2) that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder. (TT-830-31). The trial court further instructed the jurors that they did not have to be unanimous as to the criterion, as follows:

> ... Now, let me state to you: Of these two alternatives, part of you may believe one, part of you may believe another, but at least all twelve of you must believe one or the other.

(TT-830). Thus, both criteria went to the jury, and the Commonwealth argued in closing as to the second criterion as follows:

> ... I want to touch on the second alternative for your consideration, whether or not the conduct in this offense was outrageously or wantonly vile. Did it involve torture? Now, the question of what is torture is open to speculation. Does it mean physical torture, because there was no actual evidence that Mr. Gallaher was tortured ... or does it also include the terror that went through his mind ... Is that torture? I submit to you it is.
>
> Depravity of mind: Does this case involve depravity of mind? ... The question is, do you consider it depraved for such a piddling sum of money and a ring and a watch to take Mr. Gallaher's life? Does that come from a depraved mind? And I submit to you, it does.
>
> Was it more than the minimum act necessary to accomplish murder? Probably not, because it was one shot, although it was with a .30 caliber rifle.

(TT-846-47), and so concluded the Commonwealth's argument as to the second criterion for the imposition of death.

When the jury returned a sentence of death, they were polled

as to the sentence of death, insofar as each juror had to raise his/her hand when his/her name was called (TT-858). During this polling, one juror answered,"Here." (TT-858). Otherwise, the record seems to reflect that the jury was unanimous as to the sentence of death. The jurors were never polled, however, even by the raising of hands, as to which criterion or criteria were found by which jurors. The only indication anywhere in the record as to which jurors found which criteria is the following comment by the court:

> THE COURT: ... And I noticed, Mr. Foreman, by striking out an "or"--as between the two circumstances you must find, you struck out the word "or" which, I take it, to mean that you all not only were unanimous in the final verdict, but were unanimous in finding the two lawful provisions that you must find in order to impose a death sentence, is that correct?
> FOREMAN BIBB: Yes, sir.
> THE COURT: So say you all?
> NOTE: The members of the jury answer affirmatively.

(TT-859).

ARGUMENT FOR GRANTING WRIT

I. PETITIONER'S SENTENCE OF DEATH IS UNCONSTITUTIONAL BECAUSE THE RECORD DOES NOT REFLECT WITH ANY RELIABILITY WHICH CRITERION OR CRITERIA WERE RELIED UPON BY THE JURY IN THE IMPOSITION OF THE SENTENCE OF DEATH NOR DOES IT SUPPLY ANY ASSURANCE THAT THE JURORS WERE EVEN UNANIMOUS.

A. The unresolvable ambiguity and lack of certainty as to which jurors found which criterion or criteria renders Petitioner's sentence of death constitutionally infirm.

This Court has frequently recognized in reviewing sentences of death that, for a sentence of death to be constitutional, the sentencing body must be provided with sufficiently channeled criteria to narrow their discretion, Godfrey v. Georgia, 446 U.S. 420 (1980), and to supply a "meaningful basis for distinguishing the

few cases in which [the death penalty] is imposed from the many in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring); accord, e.g., Gardner v. Florida, 430 U.S. 349 (1977); Gregg v. Georgia, 428 U.S. 153 (1976).

While the idea of providing guidance to a jury in a criminal case "is hardly a novel proposition," Gregg v. Georgia, supra, at 192-193, the qualitative difference in a death penalty from any other penalty known to our law calls for a much greater degree of raliability that the death penalty has been constitutionally and rationally imposed, e.g., Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Thus, this Court has required sufficiently narrowed criteria by a state's death penalty sentencing scheme in order to supply double safeguards: first, to insure less arbitrariness and caprice in the imposition of the penalty of death in the first instance; and, second, to insure a more meaningful method by which an appellate court can review the decision to rule out the possibility of arbitrariness and caprice.

This second safeguard has been recognized as of important, independent significance in the constitutionality of a state's death penalty scheme. One of the key factors in the revised Georgia system which supported this Court's affirmance of its constitutionality in Gregg v. Georgia, supra, was its requirement that the factors relied upon be specified, making review more accurate. Id. at 195.

> Where the sentencing authority is required to specify the factors it relied upon in reaching its decision,

> the further safeguard of meaningful appellate review is available to insure that death sentences are not imposed capriciously or in a freakish manner.

Id. Similarly, a key factor in the Florida system, upheld by this Court in Proffitt v. Florida, 428 U.S. 242 (1976), was that "the trial judge must justify the imposition of death sentence with written findings ...," id. at 251, so that

> meaningful appellate review of each such sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to guarantee that the aggravating and mitigating reasons present in one case will reach a similar result to that reached under similar circumstances in another case ...,

id. (quotations omitted).

It was precisely the lack of this safeguard, this failure to supply an articulation of the reasons for the imposition of a sentence of death, that this Court held unconstitutional the sentence of death imposed in Gardner v. Florida, 430 U.S. 349 (1977). As this Court stated in that case,

> [w]ithout full disclosure of the basis for the death sentence, a capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia.

Id. at 361.

Under the Virginia death penalty sentencing scheme, there are two criteria at least one of which must be proven beyond a reasonable doubt before the sentence of death can be imposed. They are:

> 1) That there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
> 2) That his conduct in committing the offense was outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Va. Code Ann. §19.2-264.4(C)(1982 Cum. Supp.)

In the present case, as reflected in the Statement of Facts supra, there was no reliable information either required or obtained by which to determine the basis for the sentence of death given to Petitioner. While the jury was polled with regard to the recommendation of death, although with less reliability than would be hoped for, the jury was never polled as to which criterion or criteria were found by which jurors. Moreover, they had been instructed that they did not have to be unanimous, and the verdict form simply set forth the criteria in the disjunctive. The only indication anywhere in the record of this critical information is the very brief, seemingly off-hand comment by the trial court, after the recommendation of death had been determined, to the effect that it appeared on the verdict form that the jurors were not only unanimous as to death but also unanimous in finding both criteria. This comment was made to the foreman alone who answered "yes." The Court then asked, "So say you all?" and the court reporter notes, "The members of the jury answer affirmatively."

While it may well be argued that the most probable construction from the record was that all jurors found both criteria, which raises additional problems as discussed in Argument II, such surmise hardly suffices for the greater degree of reliability required before the imposition of death can be imposed, see, e.g., Lockett, supra; Woodson, supra, and presents a prohibitive amount of "ambiguity concerning the factors actually considered by the [jury]," Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring). If the Court has made one single factor unmistakably clear in its line of death penalty decisions since Furman v. Georgia,

it has made clear that a procedure or record which allows guessing as to the basis for the imposition of the penalty of death is constitutionally infirm. E.g., Gardner v. Florida, supra; Furman v. Georgia, supra. Rather, before the sentence of death can be imposed, the record must "guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake." Eddings v. Oklahoma, supra, at 116 (O'Connor, J., concurring).

Because the record in this case lacks any written statement or other clear articulation of the basis for which the sentence of death was recommended, and because the basis for the recommendation cannot with any reliability, and a fortiori cannot with the greater degree of reliability required in death penalty cases, be otherwise determined from the record, Petitioner's sentence of death is constitutionally infirm.

B. Petitioner's sentence of death is constitutionally invalid because the jurors were instructed that they did not have to be unanimous as to the criterion or criteria for recommending death and the record fails to guarantee that they were in fact unanimous or that there was even a majority decision.

This Court, in the companion cases of Johnson v. Louisiana, 406 U.S. 356 (1972), and Apodaca v. Oregon, 406 U.S. 404 (1972), has declined to incorporate into the Fourteenth Amendment the requirement of unanimity in jury verdicts. While this Court declined in those cases to hold that a verdict less than unanimous was unconstitutional, Justice Blackmun nonetheless noted with significance in his concurrence that in both cases "a substantial majority of the jury are to be convinced. That is all that is before us in each of these cases." 406 U.S. at 366 (Blackmun, J., concurring

in both cases). He continued his concurrence to the plurality opinions of both by adding, "I do not hesitate to say, either, that a system employing a 7-5 standard, rather than a 9-3 or 75% minimum, would afford me great difficulty." Id.

In the present case, because the record fails to make clear which jurors found which criterion or criteria, it is not only possible that the jurors were not unanimous as to one or more criteria, it is also possible that the jurors were evenly split on the issues, and hence not even a majority found either criterion. Thus, while this Court in Johnson, supra, and Apodaca, supra, failed to hold unanimity as a constitutional requirement, the opinions of this Court in those cases at least suggested that the Constitution requires at a minimum a majority decision, if not "a substantial majority" decision, neither of which Petitioner was guaranteed in his case.

Furthermore, even if the Fourteenth Amendment be otherwise wholly silent on this issue, the State of Virginia has provided for unanimous jury verdicts in criminal cases in both its Constitution, see Art. I, §8, and its Rules of Court, see Rule 3A:24(a). Thus, unanimity having been provided by the State of Virginia, a defendant in Virginia is entitled to unanimity as a matter of due process. See, e.g., Vitek v. Jones, 445 U.S. 480 (1980). Because the sentencing stage of a bifurcated death penalty proceeding is accorded the same due process guarantees as the guilt stage, Bullington v. Missouri, 451 U.S. 430 (1981); Gardner v. Florida, 430 U.S. 349 (1977); cf. Mempa v. Rhay, 389 U.S. 128 (1967), (recognizing the right to counsel at a sentencing proceeding), a

defendant in Virginia is entitled to unanimity as to the basis for the recommendation of death.

This right to unanimity at a death penalty proceeding, including unanimity as to the aggravating criterion or criteria found by the jury, has been recently acknowledged by the Supreme Court of Virginia. In Quintana v. Commonwealth, 224 Va. ____, 224 V.R.R. 116 (1982), the majority of that Court implicitly recognized, this requirement as a part of the Virginia death sentencing scheme. As stated by Justice Poff,

> It is axiomatic that a jury's verdict in a criminal case must be unanimous. Va. Const., Art. I, §8; Rule 3A:24(a). When the legislature conditions a penalty upon such factual predicates [as the two criteria for the imposition of death], a jury's verdict is not unanimous unless it findings are unanimous.

224 V.R.R. at 139.[1] Accordingly, because the record in Quintana's case was not clear regarding unanimity, Justice Poff opined that the sentence of death had to be commuted to life imprisonment.

In the present case, because the jury was quite specifically and clearly given a harmfully erroneous instruction on this important issue at this life-or-death stage of the proceeding, that the jurors did not have to be unanimous, and in light of the less than clear record as to the jury's findings, the impermissible possibility is present, as it was in Quintana, that the jury did not make unanimous findings in this case. Accordingly, Petitioner's sentence of death is invalid.

---

[1] The majority in Quintana did not disagree on this point. Rather, they found that there had been an affirmative ratification by Quintana's attorneys of the procedure and thus did not consider the point appropriate for commutation. However, as Justice Poff correctly pointed out in his opinion, §17-110.1of the Code of Virginia requires independent review by the Supreme Court to rule out ambiguity, and thus even affirmative ratification is irrelevant to the Supreme Court's duties.

Furthermore, even were the record clear that the jurors had returned a verdict unanimous as to both criteria, this would not cure the infirmity created by the non-unanimous instruction. The Court has recognized the right of a defendant to be sentenced by a properly instructed jury. See, e.g., Hicks v. Oklahoma, 447 U.S. 343 (1980); Andres v. United States, 333 U.S. 740 (1948); Carlton v. Utah, 130 U.S. 83 (1889). As implicitly recognized in Andres and under the logic of this Court's line of decisions from Stromberg v. California, 283 U.S. 359 (1931), to Street v. New York, 394 U.S. 576 (1969), an improper instruction can impermissibly affect jury deliberation.

In the present case, the damages of an impermissible effect on the jury's deliberations are quite real and substantial. The jury's belief that neither unanimity nor even a majority finding was required may have resulted in the lack of discussion, argument, and persuasion which is an important part of the jury deliberation process guaranteed when a unanimous or majority decision is necessary. Cf. Apodaca v. Oregon, 406 U.S. 404 (1972) (recognizing such discussion and persuasion as a significant value in a unanimous verdict requirement but holding that such discussion and persuasion would be similarly present where a majority verdict was required). The jurors may have quickly determined that all of them found at least one criterion, that, therefore, discussion or argument on any particular criterion was rather beside-the-point, and thus returned the quick verdict returned in this case without ever scrupulously considering and/or discussing the views of all jurors as to each of the two criteria. For the reasons discussed in Argument II, had they participated in meaningful deliberations

the jurors could not reasonably have found both criteria and hence could not have returned a verdict unanimous at all, since the record reflects that at least some juror or jurors found each. Thus, whatever conclusion is drawn from the sketchy record on this crucial issue of the jurors' findings, the sentence is unconstitutional and this sketchiness itself renders the sentence constitutionally infirm.

II. EITHER THE VIRGINIA DEATH PENALTY SENTENCING SCHEME IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS INTERPRETED, OR THE SECOND AGGRAVATING CRITERION, FOUND BY SOME OR ALL OF PETITIONER'S JURORS, WAS NOT PRESENT AS A MATTER OF VIRGINIA LAW IN PETITIONER'S CASE, RENDERING PETITIONER'S SENTENCE UNCONSTITUTIONAL IN EITHER EVENT.

A. Either the Virginia death penalty sentencing scheme is unconstitutional or the second aggravating criterion was not, as a matter of Virginia law, present in Petitioner's case.

Under Virginia's death penalty sentencing scheme, there are two aggravating criteria, either or both of which must be found beyond a reasonable doubt by the triers of fact before the sentence of death can be recommended. They are:

> 1) There is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
> 2) His conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim.

Va. Code Ann. §19.2-264.4(C) (1982 Cum. Supp.). This second criterion, which will hereinafter be referred to also as the "aggravated battery" criterion, is identical to its wording to that contained within the Georgia Code reviewed by this Court in Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey, this Court reiterated

the requirement of a state's death penalty system to "channel the sentencer's discretion by clear and objective standards that provide specific and detailed guidance ...," id. at 428 (citations omitted). In addressing this particular criterion of "aggravated battery," this Court noted:

> There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman."

Id. at 428-29. This Court held that, while the meaning could be constitutionally limited by the Georgia courts, "[t]he Georgia courts did not, however, so limit[ed this criterion] in the present case." Id. at 432. Accordingly, this Court held that there was "no principled way to distinguish [Godfrey's] case, in which the death penalty was imposed, from the many cases in which it was not," id. at 433, based upon this "aggravated battery" criterion; and the judgment of the Georgia Supreme Court affirming the sentence of death was reversed.

Because the "aggravated battery" criterion involved in Petitioner's case is identical with that involved in Godfrey, its constitutionality must also necessarily depend upon an adequately narrowed interpretation by the Supreme Court of Virginia. Upon review of that Court's decisions, it will be seen that only twice has the Supreme Court of Virginia ever attempted to shed light through its opinions on the wording of this criterion.

The first occasion was in Smith v. Commonwealth, 219 Va. 455 (1978). In Smith the facts showed that the defendant had seen his female victim walking alone on a beach, had ordered her to disrobe

upon display of a knife, raped her, then choked her with both hands until she went limp, dragged her to the water where he then held her head under the water until she stopped moving, and finally stabbed her in the back several times.

In that pre-Godfrey decision, the Supreme Court of Virginia proceeded to interpret the terms "depravity of mind" and "aggravated battery." "Depravity of mind" was defined as meaning "a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation." Id. at 478. While the Supreme Court did continue to state that this definition was the only construction of "depravity of mind" which was "rationally related to the commonly accepted connotation of the prefatory words, 'outrageously or wantonly vile, horrible or inhuman,'" id., these sparse, cryptic comments are the only assistance the Supreme Court of Virginia has ever supplied to the application of that term, and this was precisely the definition given by the trial court in Petitioner's case. (TT-831). As can be seen from the record of Petitioner's case, the trial court itself did not understand the meaning of this definition, stopping to ask as it gave the instruction, "What is that next word, p-s-y-c-h-i-c-a-l?", to which defense counsel responded, "Judge, that is taken from Smith versus Commonwealth." (TT-831). Furthermore, under such a vague definition, it can be seen that not only most if not all cases of capital murder but even cases of first degree murder, for which death is not a penalty, would qualify, in that first degree murder involves permeditated, malicious murder by poison, starvation, lying in wait, etc. Va. Code Ann. §18.2-32 (1982 Repl. Vol.).

As for "aggravated battery," the Supreme Court of Virginia in Smith v. Commonwealth, supra, stated only that this term means "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder," id. at 478. The Virginia Supreme Court has never defined "torture."

Following Godfrey, the Supreme Court of Virginia again addressed the term "aggravated battery" in Whitley v. Commonwealth, 223 Va. ____, 223 V.R.R. 60 (1982). In Whitley, the defendant had killed his sixty-three year-old, widowed next-door neighbor, first strangling her with his bare hands, then with a rope, then taking a knife and cutting her jugular vein as she prayed for her life. The defendant then proceeded to insert an umbrella into her vaginal cavity puncturing the vaginal wall and bruising the small intestine, and to force another umbrella into her rectal cavity, piercing the wall and damaging a major artery.

The Supreme Court of Virginia found easy distinction between the facts of Whitley and those in Godfrey v. Georgia, noting that "Godfrey's victim died almost instantaneously from a single gunshot ...," Whitley, supra, at 70, and reiterating the interpretation that "aggravated battery" means "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder," id. Holding that the facts in Whitley presented more than the minimum necessary to accomplish the murder, the Supreme Court gave no further assistance as to the application or interpretation of the term "aggravated battery."

Should these pronouncements by Virginia's highest court appear at first blush sufficient to channel properly a jury's discretion

and to provide a basis for assuring a uniform application of the death sentencing scheme, their failure in fact so to do can be seen by a review of the Supreme Court's last three opinions in which this second aggravating criterion was presented when then compared with Petitioner's case.

The most recent such case is Quintana v. Commonwealth 224 Va. ____, 224 V.R.R. 116 (1982), in which the defendant had attacked a seventy-two year-old woman in her apartment with a hammer, inflicting a dozen lacerations, contusions and bruises to her head, neck and shoulders. The victim's skull was fractured eleven times, most of which injuries would have been fatal. The Supreme Court of Virginia ruled that this met the "aggravated battery" criterion. Id.

In the case prior to Quintana, Fitzgerald v. Commonwealth, 223 Va. ____, 223 V.R.R. 541 (1982), the defendant, looking for drugs, broke into the victim's residence, struck the victim on the eye and forced her to kneel on the floor nude, raped her despite her protestations that she was menustrating, then struck her several times with a machete, then seized her purse and led her to woods where he pushed her to her hands and knees and forced oral sodomy until she could not continue because of blood in her mouth. He then struck her again with a machete. She pleaded at this point to be shot, but instead the defendant proceeded to mutilate her by stabbing and slashing her repeatedly, from head to feet, front, side, and back, including both eyes, as well as genital and rectal areas, with a machete and a knife. He then kicked her a few times and covered the then dead body with leaves.

The case prior to Fitzgerald was Clanton v. Commonwealth, 223 Va. ____, 223 V.R.R. 36 (1982). In Clanton, the evidence showed the defendant strangled the victim with a belt, and inflicted bruises, cuts and stab wounds not more than one-half inch deep which, the coroner testified, was probably the result of holding the edge of a blade to a victim whose head was back. An excessive amount of blood was found in the apartment. Although the Supreme Court of Virginia noted that it could not tell which criterion was found by the jury, it nonetheless concluded that it could have been either, and thus, according to the Court, could validly have been "aggravated battery."

In contrast to the facts of Quintana, Fitzgerald and Clanton, particularly Fitzgerald which could be seen as the most clear case meeting the second criterion of those discussed, the facts of Petitioner's case, from a light most favorable to the Commonwealth, showed only, as in Godfrey, a one-shot, instantaneous death. There was no kicking, no hitting, no cutting, no multilation, no sexual abuse, no umbrellas. Although the Commonwealth's Attorney argued to the jury in summation that, while there was no physical torture, "the question of what is torture is open to speculation" (TT-846), and that it takes a depraved mind to kill someone "for such a piddling sum of money," (TT-847), even the Commonwealth's Attorney himself admitted in summation that there was "[p]robably not" more than the minimum act necessary to accomplish murder, (TT-847).

As this Court readily recognized in Godfrey, it goes without saying that no law-abiding citizen would consider any capital murder

to be other than disgusting, depraved. It goes without saying that no law-abiding citizen could find any deliberate, premeditated, malicious killing as by poison or starvation, which is first degree murder in Virginia, less than vile and disgusting. But in order for the Virginia death penalty sentencing scheme to be constitutional, the question is and must be: what more is there in a particular case which would constitute conduct "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim?" Under no constitutionally narrowed construction of that criterion as a further aggravating criterion for which death may be imposed can it be said that this criterion was present in Petitioner's case. Again, even the Commonwealth's Attorney in closing conceded that there was "probably" no more than the minimum necessary to accomplish the act of murder.

Any other construction, any interpretation by which this criterion is present in Petitioner's case, would reduce this aggravating circumstance to meaningless in that it would be an aggravating circumstance present in all first degree and capital murder cases, as these crimes are defined under Virginia law. Since, under Virginia law, a jury need only find this one aggravating circumstance for the imposition of death, any interpretation of this criterion so broad as to encompass Petitioner in this case will place Virginia's system on virtually the same footing as the Georgia system found infirm in Furman v. Georgia, 408 U.S. 238 (1972), and more recently in Godfrey v. Georgia, supra: The decision for imposing death would be given the jury with totally open-ended, unguided discretion, since a sufficient criterion for death would be present in all first degree

and capital cases. Because any such broad interpretation would fail to channel in any meaningful way the jury's discretion, such interpretation would render Virginia's death penalty system unconstitutional.

Only if this criterion has been sufficiently narrowed by the Supreme Court of Virginia can it be upheld, and if sufficiently narrowed, the facts in Petitioner's case did not present this second criterion as a matter of law. Thus, there can be only one of two conclusions from the juxtaposition of the second criterion with the facts of Petitioner's case: 1) the second criterion of Virginia's death penalty sentencing scheme is unconstitutionally vague and overbroad; or 2) the second criterion was not present as a matter of Virginia law in Petitioner's case.

B. The finding by some or all of the Petitioner's jurors of a criterion which was not, as a matter of law, present in Petitioner's case, renders Petitioner's sentence unconstitutional.

Whatever finding by the jurors can be surmised from the record, the record most clearly indicates that some if not all jurors found the second criterion of "aggravated battery." Because, therefore, some or all of Petitioner's jurors found a criterion for the imposition of death which could not, as constitutionally interpreted, exist in this case, Petitioner's sentence of death is unconstitutional. This follows for two basis reasons.

First, a decision of death, based on a constitutional and unconstitutional ground, cannot stand, a result made all the more compelling where, as here, it is impossible to know with certainty how many jurors relied on this criterion for imposing the sentence of death. As has been briefed for this Court by Respondent in Zant v. Stephens, ___U.S.___, 51 U.S.L.W. 3378 (Nov. 16, 1982)(No. 81-89),

and as this Court has recognized in a line of cases from Stromberg v. California, 283 U.S. 359 (1931), through Street v. New York, 394 U.S. 576 (1969), where it is impossible to say upon which factor a verdict has been based, and where one possible factor is invalid, the resulting conviction [or sentence] is unconstitutional. Cf. Quintana v. Commonwealth, 224 Va.__, 224 V.R.R. 116 (1982)(in which Poff, J., concurring and dissenting, recommends commutation of the death sentence to life imprisonment, as required by §17-110 of the Code of Virginia, because of the ambiguity and uncertainty as to which criterion or criteria were found). To the extent a conviction [or recommendation] could have been based upon both a constitutional and unconstitutional ground, the result is invalid because of the "unacceptable danger the jury may have regarded the two [grounds] as 'intertwined' and have rested their conviction [or recommendation] on both together." Street, supra, at 588.

Because of the erroneous instruction in this case as to unanimity discussed supra, this danger is in the present case all the more unacceptable. The jurors were instructed simply that they did not have to be unanimous as long as each found one or the other criterion. At the very least, this could have resulted in less care in dealing with each separate criterion and, to the extent all jurors found one or the other, the specific facts needed to support a unanimous finding of either criterion were simply not important. Thus the jury may well not have gone through the often arduous and very important step of discussing all aspects of each criterion to ascertain that

each and every juror was of a like mind as to each. Thus, even assuming arguendo that the first criterion of "dangerousness" could validly have been found by the jury, this sentencing procedure lacks the degree of reliability needed in any criminal case and a fortiori the greater degree required in capital cases where the sentence of death has been imposed. See, e.g., Lockett v. Ohio, 438 U.S. 586 (1978); Woodson v. North Carolina, 428 U.S. 280 (1976). Furthermore, because the record does not rule out in any reliable fashion the possibility that at least some jurors may have rested solely on the second criterion, Petitioner's sentence of death is all the more infirm.

Second, this Court has made clear that it is of considerable importance before the extreme penalty of death be imposed that the decision-makers not have been governed by passion, prejudice, or caprice. See, e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Irvin v. Dowd, 366 U.S. 717 (1961); cf. Va. Code Ann. §17-110.1 (requiring the Supreme Court of Virginia to exclude the possibility of prejudice or caprice). Yet when some or all of the jurors in a case make a finding which does not at all exist in a case under any constitutional interpretation, much less beyond a reasonable doubt, then the rationality and impartiality of the jury must necessarily be called into question, particularly if the jurors were unanimous as to the non-existent factor. In the present case, at least some and possibly all of the jurors found a non-present criterion. Accordingly, the rationality and impartiality of the decision-makers in Petitioner's

case are necessarily suspect and Petitioner should not be executed based on the recommendation of such a jury. Thus, for these two reasons, individually and in combination, the finding by some or all of the jurors in Petitioner's case of this second, invalid criterion renders Petitioner's sentence of death infirm.

ADDITIONAL REASONS FOR GRANTING WRIT

1) No part of the Virginia death penalty sentencing scheme has been reviewed by this Court, but, as discussed above, there are serious constitutional questions as to its application generally and in Petitioner's case specifically, including application directly in conflict with Godfrey v. Georgia, 446 U.S. 420 (1980).

2) The question of ambiguous and/or non-unanimous jury findings under the Virginia or similar death penalty statutes has never been squarely addressed by this Court.

3) The question of the constitutionality of a sentence of death when one of the two criteria found by a jury for the recommendation of death is invalid is the same as or closely related to issues which this Court is currently examining. See Zant v. Stephens, __U.S.__, 51 U.S.L.W. 3378 (Nov. 16, 1982)(No. 81-89); Barklay v. Florida, cert. granted, __U.S.__, 74 L.Ed. 2d 382 (Nov. 8, 1982)(No. 81-6908).

## CONCLUSION

For the reasons aforesaid, Petitioner prays for a Writ of Certiorari.

LINWOOD E. BRILEY

By Counsel

Deborah C. Wyatt
Wyatt, Rosenfield & Green
917 East Jefferson Street
Charlottesville, Virginia 22901

## AFFIDAVIT OF SERVICE

I, Deborah C. Wyatt, being duly sworn, do hereby state that on or before this 22nd day of February, 1983, I caused this Petition for Writ of Certiorari, along with the accompanying Motion for Leave to Proceed In Forma Pauperis and Affidavit, to be deposited in a United States Post Office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2. I further state that on or before this 22nd day of February, 1983, I caused a copy of each of the above-mentioned documents to be sent to James E. Kulp, attorney for Respondent, Office of the Attorney General, 101 North Eighth Street, Richmond, Virginia 23219,

by depositing the documents in the United States Post Office or mailbox, with first class postage prepaid.

Deborah C. Wyatt

NOTARIAL CERTIFICATE

STATE OF VIRGINIA

CITY OF CHARLOTTESVILLE, to-wit:

The foregoing affidavit was subscribed and sworn to before me by Deborah C. Wyatt on this 22nd day of February, 1983.

Notary Public

My commission expires: June 3, 1984.

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Pertinent portions of Petition for Writ of Habeas Corpus

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND, DIVISION II

LINWOOD E. BRILEY,

Petitioner

v.

J. P. MITCHELL,
Superintendent
Virginia State Penitentiary
500 Spring Street
Richmond, Virginia

Respondent

PETITION FOR WRIT OF HABEAS CORPUS

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Petitioner, Linwood E. Briley, by counsel, and represents unto this Honorable Court that he is illegally held, under sentence of death, in the custody, confinement and restraint of the Respondent, his agents and employees, at the Virginia State Penitentiary, located in Richmond, Virginia, and that his confinement under sentence of death is illegal as set forth below.

JURISDICTIONAL FACTS

1) The judgment of conviction and sentence under attack were entered and imposed by the Circuit Court for the City of Richmond, Virginia, Division II, sitting in Division I.

2) Petitioner was charged with capital murder in violation of §18.2-31 of the Code of Virginia (1950), as amended, in that he allegedly intentionally and knowingly murdered John Gallaher during the commission of a robbery while armed with a deadly weapon. Petitioner was also convicted of using a firearm in the commission of a felony.

3) Petitioner was represented at trial by court-appointed counsel, Frank N. Cowan, Charles L. Board, and Bruce E. Robinson, all of Richmond, Virginia; on appeal, by Frank N. Cowan; and on Petition for Writ of Certiorari from the United States Supreme Court by Frank N. Cowan and Deborah S. O'Toole, also of Richmond.

4) Your Petitioner plead not guilty to all charges; his case

was heard by a jury in the Circuit Court for the City of Richmond the Honorable William E. Spain, Judge, presiding.

5) While the Petitioner was indicted on these charges both in Division I and Division II, and although his trial took place in Division I, the case was initially instigated in Division II and the file of the case is currently located in the Clerk's Office of Division II of the Circuit Court for the City of Richmond.

6) On February 21, 1980, the jury convicted your Petitioner on both charges. The jury then heard on February 22, 1980, evidence for sentencing, retired to consider the sentence for capita murder, and fixed the Petitioner's sentence at death. The sentence of death was imposed by this Court on March 10, 1980.

7) Your Petitioner is now scheduled to be put to death by electrocution on October 23, 1981.

8) Your Petitioner appealed his conviction and death sentenc to the Supreme Court of Virginia, which affirmed the judgment of this Court on the 26th day of November, 1980. Your Petitioner timely filed a petition for rehearing, which was denied on Januar 16, 1981.

9) Your Petitioner timely filed a petition for writ of certiorari with the United States Supreme Court on March 17, 1981 which petition was denied.

10) No previous petitions for writs of habeas corpus have been filed.

11) Your Petitioner's sentence of death has been imposed in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United State and by Article I, §§8, 9, and 11 of the Constitution of Virginia

12) The allegations of the illegality of Linwood E. Briley's detention under sentence of death can not fully be determined on the basis of matters of record alone, and this Court should hold a plenary hearing on the merits on this Petition, at which time Petitioner would present evidence in support of his Petition.

CLAIM I

13) The charge, trial, and sentencing under the capital murd

A) The imposition of the death penalty generally and in Petitioner's particular case constitutes cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. See, e.g., Adams v. Texas, 448 U.S. 38 (1980) (Brennan and Marshall, J.J., concurring); Godfrey v. Georgia, 446 U.S. 420 (1980) (Brennan and Marshall, J.J., concurring).

B) The statute under which Petitioner was tried and convicted fails to distinguish in any meaningful fashion between first degree murder for homicide in the commission of a robbery and capital murder involving the same elements, and thus the indictment, trial, and sentencing for capital murder was arbitrary and discriminatory by the Commonwealth and allowed an arbitrary imposition of death for a crime not distinguishable in any meaningful fashion from a crime for which death i not a penalty. See, e.g., Godfrey v. Georgia, supra; Furman v. Georgia, 408 U.S. 238 (1972).

C) The capital murder statute as pertains to the criteri at the sentencing stage is vague and overbroad on its face as evidenced by the pattern of its application, and is vague anc overbroad as applied to Petitioner in his particular case in violation of his right to equal protection and due process. See, e.g., Godfrey v. Georgia, supra.

D) The capital murder statute, to the extent it permits a non-unanimous finding as to the criterion for imposing death, violates Petitioner's right to due process and a unani mous jury verdict. See, e.g., Bullington v. Missouri, __U.S. __, 68 L. Ed. 2d. 270 (1981).

E) The capital murder statute under which Petitioner wa sentenced is unconstitutional in not requiring an unanimous finding as to both criteria and not just one of the two criteria.

CLAIM II

14) Petitioner was denied his right to a verdict by a fair, impartial, and unanimous jury representing a cross-section of th community in that:

A) The Court automatically struck for cause, without

dire to prejudice the jury, as by stating on individual voir dire to the majority of the veniremen that the case was one of capital murder and that the prosecution would show aggrava ting circumstances warranting death and that the defense migh attempt to show mitigation, violating Petitioner's right to a fair and impartial jury verdict rendered on the basis of rea son and not caprice or emotion. See Beck v. Alabama, 447 U.S. 625 (1980).

H) The Court, in its conduct of voir dire, failed to de mand and, in fact, did not get answers whatsoever to most of the questions posed by the Court to any of the panel of veni men, including in response to questions going to fundamental and constitutional issues of bias and impartiality, and, in fact, the record reveals that at least one such venireman stated that he did not know that he was supposed to answer said questions at the time they were asked by the Court. Se Beck v. Alabama, supra; Irvin v. Dowd, supra.

I) Petitioner did not receive the assurance of a unani mous verdict on either the issue of guilt or sentencing, in that the Court did not conduct a true, meaningful poll of th jury but rather simply asked for the jurors to raise their hand if they agreed with the verdict, and where the record shows that on both the issue of guilt and sentencing, one o more jurors when polled answered "here" when the name was called, indicating a likelihood that at least some of the m bers of the jury did not understand the process or what was being asked of them. See Irvin v. Dowd, supra.

CLAIM III

15) Petitioner was denied due process and equal protection by the lack of a fair and full hearing in that:

A) The Commonwealth's Attorney gave an inflammatory an argumentative opening statement, and the Court refused to grant a mistrial or otherwise to cure this defect. See Bec v. Alabama, supra.

B) The Court refused to exclude witnesses until the en

see Beck v. Alabama, supra, but which the Court refused to cure in any fashion.

M) The Commonwealth's Attorney acted improperly in creating misimpressions or false impressions before the jury with regard to the presentation of evidence and in his closing argument, as by arguing in closing that the consent search of Petitioner's car had not been consensual at all because the Petitioner was already arrested and the police already had valid search warrants, which evidence was not in the record and, if anything, was refuted by the Commonwealth's own evidence.

N) The Court impermissibly and unconstitutionally restricted the evidence which the defense could present in mitigation, amounting to a near total denial of the right to present evidence in mitigation, which right is constitutionally mandated. Lockett v. Ohio, 438 U.S. 586 (1978).

O) The Court erroneously ruled at the sentencing stage that the jury could consider the number of felony convictions of Petitioner in deciding whether to "punish more" where the only two possibilities for sentencing were life in prison or death and where the criteria for death are otherwise set forth in the statute. See Godfrey v. Georgia, supra.

P) The Court allowed and the Commonwealth offered evidence of the length of the sentences already received by Petitioner on other convictions, which evidence is unconstitutional particularly when coupled with the defense's inability to argue as to the parole ramifications of these sentences, such as the fact that Petitioner would not be released until the Parole Board determined that he was no longer a danger to society, as was precluded by the Virginia Supreme Court in Hinton v. Commonwealth, 219 Va. 492 (1978).

Q) The Court gave improper and inadequate instructions to the jury at the sentencing stage, including, but not limited to, the instruction that the jury did not have to b

unanimous in their verdict as to which of the two death penalty criterion they found if any, which instruction coul have led to confusion particularly possible in light of the inadequate polling of the jury as set forth elsewhere herei and in violation of Petitioner's right to a unanimous jury verdict at the sentencing stage. See Bullington v. Missour supra.

R) The Court erred in submitting the question of the death penalty to the jury since, as a matter of law, no reasonable jury could have found the requisite criteria in this case, and in particular with regard to the second criterion which was not at all met by the evidence in this case, see Godfrey v. Georgia, supra, and the failure of the Judge to make findings as a matter of law as to these criteria allowe evidence before the jury that could have impermissibly influenced the jury or otherwise resulted in an arbitrary and discriminatory imposition of the death penalty. See id.

S) Although the record is not clear, to the extent the jury returned a verdict which was unanimous as to both criteria, and thus necessarily the jury was unanimous as to the second criterion, and to the extent the second criterion was as a matter of law not present in this case, see Godfrey v. Georgia, supra, the jury was necessarily moved by passion and prejudice, as also evidenced by their quick verdict as to guilt, and the verdict should have been set aside. See Beck v. Alabama, supra.

T) The Court erred in not setting aside the sentence of the jury upon an independent review of the facts of the case which did not warrant imposition of the death penalty.

CLAIM IV

16) Petitioner was denied his Sixth Amendment right to meaningful and effective assistance of counsel in that:

A) Counsel had insufficient time to prepare for trial.

B) Petitioner had no attorney to represent him when he was questioned by the police on the 23rd and 26th day of October, 1980, one and four days respectfully after his arres

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND, DIVISION I

LINWOOD E. BRILEY,

Petitioner

v.

J. P. MITCHELL,

Respondent

Order of November 18, 1981, entered December 15, 1981, by the Circuit Court for the City of Richmond, Case No. 81-1519

ORDER

On November 18, 1981, came Petitioner and Respondent, by their respective counsel, upon the Petition for a Writ of Habeas Corpus, the Motion to Amend Petition, and the Answer thereto by Respondent. Following argument by counsel as to which issues should be addressed by this Court upon the Petition, it is hereby Ordered that the following issues are denied for the reason of their having been decided by the Supreme Court of Virginia on the appeal from the trial court decision:

Claim I, Paragraphs B, C.
Claim II, Paragraphs C, D, E, F, G.
Claim III, Paragraphs A, F, G, I, J, K, L, M, O, P, Q, S, T.

It is further Ordered that the following claims are denied for the reason that the issues are purely matters of error and not matters of constitutional defects and thus should not be entertained by this Court on the Petition for Writ of Habeas Corpus: Claim III, Paragraphs B, E, H.

It is further Ordered that Paragraph A of Claim I is denied on the merits.

It is further Ordered that Claim V is denied except insofar as it reflects ineffective assistance of counsel because of the failure of Petitioner's counsel to raise this claim at trial or on appeal.

It is further Ordered that the Court will entertain oral argument with evidence limited to the record of the case alone for the following claims:

Claim I, Paragraphs D, E.
Claim II, Paragraphs A, B, H, I.
Claim III, Paragraphs C, D, N, R.
Claim IV, Paragraphs D, E, I.
Claim V, All Paragraphs.

And it is further Ordered that the Court will entertain evidence and argument as to the following claims: Claim IV, Paragraphs A, B, C, F, G, H, I, J, K.

Petitioner's exception to the denial of any of the claims asserted on this Petition for Writ of Habeas Corpus is hereby noted.

Entered this 15th day of December, 1981.

I ask for this:

James E. Kulp
Deputy Attorney General
900 Fidelity Building
Richmond, Virginia 23219
Counsel for Respondent

Seen and objected to as noted:

Deborah C. Wyatt
Wyatt & Rosenfield
917 East Jefferson Street
Charlottesville, Virginia 22901
Counsel for Petitioner

CS1M051 Order of December 18, 1981, entered December 21, 1981, by the Circuit Court for the City of Richmond, Case No. 81-1519.

# Virginia:

## In the Circuit Court of the City of Richmond, Division 1,

THE 18th DAY OF December 19 81

LINWOOD E. BRILEY,
Petitioner,

v.

J. P. MITCHELL,
Respondent.

FINAL ORDER

On December 15, 1981, came Linwood E. Briley, the petitioner, in person, and by Deborah Wyatt, his court-appointed attorney, and came also the respondent, by James E. Kulp, Deputy Attorney General, to be heard upon the petition for a writ of habeas corpus, amendments thereto, upon pleadings duly received and filed and orders heretofore entered.

After hearing evidence and upon consideration thereof, the Court finds and is of the opinion that the prayers of the petitioner should be denied and the petition dismissed for the reasons that there was not any evidence that the attorneys for the petitioner were incompetent in his defense and that the trial judge was in any way prejudiced against the defendant, and that the attack on both trial counsel and the trial Court was frivolous and without merit; and for the further reasons stated in the Court's Findings of Fact and Conclusions of Law set forth in the record, which, by reference, are made a part hereof.

Now, therefore, for the reasons set forth, the Court ADJUDGES, ORDERS and DECREES that the prayers of the petitioner for a writ of habeas corpus be denied and the petition dismissed, the writ discharged and the petitioner remanded forthwith to the custody of the respondent.

The petitioner duly notes his exception to the ruling of the Court.

CS139052

# Circuit Court of the City of Richmond, Division 1,

LINWOOD E. BRILEY, Petitioner vs. J. P. Mitchell, Respondent 

And it is further ordered that within sixty days a transcript of the proceedings be prepared and made a part of the record when filed with the Clerk.

Under the foregoing ruling of the Court, there being no merit in this habeas corpus proceeding, counsel will not be appointed for an appeal.

This order is stayed for a period of thirty days in order that the petitioner may appeal if he so desires.

The Clerk is directed to forward a copy of this Order to the petitioner, Linwood E. Briley; Deborah Wyatt; and James E. Kulp, Deputy Attorney General.

December 18, 1981

A Copy. Teste: [illegible], Clerk

D.C.

THE COURT: All right. Do you have any argument?

(No response.)

THE COURT: The fact is, ladies and gentlemen, I really don't need any argument in the case. I think the case presented is without a scintilla of evidence of incompetency of counsel. I think that Mr. Cowan, Mr. Robinson, and Mr. Beard found themselves with a case of overwhelming evidence. They had planned their strategy; perhaps hindsight might make it look different. I recall when I was practicing law, I never lost a case where I might not look back at that case and say, I should have done something different.

But, by the evidence as has come out before the Court today, Mr. Duncan Meekins who was a witness, Mr. Meekins apparently had been impressive to the attorneys as they watched him testify in the preliminary hearing. They had also observed him in the particular case I tried. I believe it was Mr. James Briley. In both cases, the jury overwhelmingly believed the testimony of Duncan Meekins.

The difference with this case is, it was really not one on one; it was not Mr. Briley versus Meekins, but there was corroboration of this testimony in the things that were missing from Mr. Gallagher. I believe it was a stereo, a ring, and a watch, some of the things that are acquired, which any able defense attorney knows is devastating evidence. The man has been murdered and shortly thereafter, this evidence is found in the possession of someone.

I believe if you study some of the cases you find in Virginia and throughout the nation, you will find there has been sufficient evidence for people to have been executed or sentenced to long terms in prison. I have gotten a right good feeling of the other cases, feeling somewhat, being a judge but also a lawyer by education and training, the real things that they were confronted with in this case within the bounds of ethics -- and I believe as said by Justice Marshall, it is justice under the law. The Bar, the Courts, the lawyers are bound by ethics.

As Mr. Cowan says, he believes he could have planned a much better defense had Mr. Briley told him that he was present and that Mr. Meekins

did the shooting under the capital murder statute. But, I don't think it is his duty, and this Court does not think there is a duty on any lawyer to fabricate a story for his client. In fact, if he found out the truth and helped to fabricate a story for a client, I would deem it a very serious matter; not, Mrs. Wyatt, that you have asked the Court to do that.

I have seen what I call picky things, where we have two transcripts, and the witnesses didn't testify -- lawyers are technical people. It wasn't, you say this and the next time you say that, that is an inconsistency. But, I gather from the testimony, many of the inconsistencies of Mr. Meekins were brought out before the jury and the jury resolved that issue.

I have listened all day and strained all day to find the real issue of where the attorneys were incompetent. I haven't been able to find any evidence, any credible evidence that they were incompetent.

I have come to this conclusion: Beyond any doubt, there were three lawyers who wanted to give the best defense they could to Mr. Briley. They were confronted by facts which they couldn't

change. They were confronted by facts that were there which continued to be reiterated, had previously been reiterated or stated, and by overwhelming evidence that was presented, whether by an overzealous prosecutor or one that was well prepared, it is not the duty of the Court to say at this time. They were confronted with a major problem.

It hasn't been shown that they didn't talk with the defendant, but they have seen him. I believe one attorney went six times to Powhatan to see him and saw him many times before. They kept him advised.

I certainly think, in my opinion, that they have measured up to a reasonable degree or measured up to the highest degree of the legal profession. We cannot change the facts, and the facts are there. The facts were presented, and under the jury system, they are to find the facts. This particular case, in selecting the jury, which they used, which they called it tactical -- you look back now and it might have been wrong, but I believe, as Mr. Cowan put it, he wanted a majority of blacks, a majority of women. I would say the vast majority of lawyers, criminal lawyers and lawyers who try

cases in every court would like to see compassion from the women. Whether it is right or wrong, I think they feel there is more compassion from women than from men, and that's what they were perhaps looking for. I don't know if that is a true feeling of people, but I am saying that is the case for lawyers that I have talked with in selecting juries. I have had the privilege of trying quite a few jury cases, and like the old scions of England, I guess we do discuss the jury and we discuss the compassion of the jurors and get the feelings of the lawyers. So, I can't say in this locality that that would be an incompetent thing.

The voir dire, in discussing that, once the juror came to that, I think many competent lawyers in this community would not like to push a juror, especially from the defense standpoint, to the point that may be irritating to them on the capital matter.

On this matter of a refusal by the Virginia Supreme Court, which they didn't find anything on direct appeal, Mr. Cowan, I believe -- no, I believe he said he abandoned that point because he was satisfied with the jury. So, being satisfied with the jury, certainly, Mrs. Wyatt,

and in all certainty -- maybe in hindsight any lawyer would say, I certainly would like to have had another jury. But, it is not a question of whether he used legally the ordinary care in a case of this magnitude for the defense of his client.

With regard to the next step, we come to the trial aspect of it. Many lawyers in this community have said, and I think throughout Virginia where I have had occasion to sit, whether it is better to actually have the medical doctor there, the pathologist, to describe to the jury, and sometimes it would be rather gory, or whether the Chief Medical Examiner's report comes in, and take a chance that the jury wouldn't read everything and stipulate the cause of death. That is a trial tactic. Some lawyers might prefer that. Some lawyers might say, I want to play this case down as much as I possibly can.

In talking to the witnesses, even the fingerprints -- and I agree with Mr. Cowan's analysis. I am not saying it is right, but it certainly is a decision that an ordinary, prudent lawyer would make. Once my client admits his fingerprints are there, it is no sense in making --

he couldn't touch it; I was there, I took it. I don't guess any lawyers have had more dealings in the Virginia Supreme Court than I have with fingerprints, starting with the one of Williams versus the Commonwealth, where the fingerprint is supposed to have been and where it isn't. It is highly suspicious when your fingerprint is in the man's car when it has been stripped, especially, as I understand it, it is up under the backboard or under the sideboard. His client came up with an explanation. I think he came up with two, actually. One is, a wire was loose and he tried to fix the wire, and then the other time, he came up with an explanation of, well, we did strip the car and took the stuff out, that was why the fingerprint was there. I really don't see any issue there.

As to the insanity plea, from everything the Court has heard from the other trial, from Dr. Foster, even up to today to Dr. Dimetris, there is nothing mentally wrong with the defendant in a legal sense. He said he has explored that. In this area, we have relied on Dr. Foster for years. In fact, just about ever since I can remember -- and that is a right good while -- we have

relied on the reports of Dr. Foster and Dr. Gayle, until Dr. Gayle passed on. But, Dr. Foster, up until the Community Mental Health thing, has been very helpful to the Court. I think lawyers throughout this community rely on him, and the report says the man is all right. They have talked to the man and he appears to be all right. There are no failings in the relationship, so we take out that. Of course, I think another good point is, he is definitely not saying I was there. I was insane at the time or mentally ill. Here is a man that says, I wasn't there. I don't know anything about it. They went further and talked to his two brothers. They went to James and talked to him. Then, it became a thing of weight, of what to do. They were represented by attorneys, and under that, they had a certain duty. But, they said, we just do not know anything about it. We don't know anything about the nickname of Mr. Gallagher, and nothing of the sort. We don't know anything about it. Well, there was a question there. So, they decided not to call him. I think that is purely tactical. I would be rather reluctant myself to call a witness that looks pretty scared as much as one of the persons. The purpose of cross-examination

of people is if they talk too much, they get nervous and might even confess. That is certainly a risk a lawyer has to take. Then, the defendant says, well, I don't want to call them. If you get them, I don't want to call them. So, they didn't. The only one is Cynthia -- and I am sorry, but I don't remember her last name -- that was by Mr. Kulp, which I understand was in the record, it wasn't a prearranged date with her. He just -- Duncan Meekins told him she wanted to see him, so he headed over to Church's Chicken, but never got there because his car broke down.

One of the real dilemmas I think the lawyers in this case found themselves in at this time, when they talked with the defendant, one lawyer said there were three stories and another lawyer said there were four stories. Well, I think the lawyers, I think if they were here, they had to take what the client said, hoping that the client is telling the truth. If a person is telling him the truth -- and I think most good lawyers tell the truth -- no matter whether he can better prepare your defense, if there is one, but I believe Mr. Beard termed four different stories were told him, and Mr. Cowan said three and possibly four

stories were told him, until finally he was backed up to the situation of, I was there, Meekins came down and picked me up in a big car, a Lincoln or whatever it was, and I helped him to strip the car. So, I think you have to weigh that. In fact, I think one of the main things of being incompetent is if a lawyer is not weighing evidence against him or her, closing their eyes and saying, it didn't happen, sort of like an ostrich, nothing is around me. But then, I think Mr. Cowan and his two co-counsel said they had many meetings. They even went with Mr. Cooley in his office, with other lawyers, that represented either Mr. Briley or his brother, and they discussed the strategies in the various cases.

I don't know of any rule at all saying the lawyer must do the impossible. I know of no rule of law that says the lawyer must be dishonest. I know of no rule of law that says a lawyer must win. I know of no rule of law that says if you do not win, you are incompetent. But, incompetency is a matter, I guess as Mr. Cowan phrased it, if he has done something wrong, tell him, but he didn't appreciate the allegation when he hasn't done anything wrong.

I am calling this finding of fact, how

the evidence has hit me, what the evidence has said, and I also make the definite opinion that the facts in my opinion that we have, other courts with compassion, their opinions might be different. But in my sincere and honest opinion, there has not been one scintilla of evidence of incompetency of counsel. I really feel that perhaps, and I wouldn't want Mr. Briley not to have every legal right that he might follow, but I see nothing here that would say that the lawyers were incompetent. If that is incompetent representation, then no one in the nation could be competently represented unless they were turned loose tomorrow. That is adverse to our system of justice.

Thank you ladies and gentlemen for your patience today.

Mrs. Wyatt, I note your exception to the Court's rulings.

MR. KULP: May it please the Court, in order that the record will be abundantly clear, I think I understand the Court's rulings, but I want to be sure.

THE COURT: I couldn't be any clearer. I see that there is a total lack of evidence for incompetency.

MR. KULP: I understand. I wish to know if you make a finding whether the performance of counsel in this case, that the standards were in the realm of a criminal activity.

THE COURT: I have said that three times, of the average, prudent lawyer. I left out criminal practicing criminal law and defending cases in this locality and the other localities that I have sat in Virginia, that they came up above the standard of care. They did what they could do within their power, with what they had. If some other Court says they are supposed to do different, and it is higher than this Court, then that is that, because I don't inquire into other Court's decisions, other than to read them and follow them.

All right. Ladies and gentlemen, I wish to thank you for your patience. Mr. Briley will be remanded to the Superintendent of the Virginia State Penitentiary.

* * * * * * * * * * * * * * * * * * * * * * * * * * * * * * *

HEARING CONCLUDED

Order of March 25, 1982, by the Supreme Court of Virginia making the trial transcript a part of the record on appeal.

## *VIRGINIA:*

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Thursday *the* 25th *day of* March, 1982.

Linwood E. Briley, Appellant,

against Record No. 820509

J. P. Mitchell, Superintendent, etc., Appellee.

From the Circuit Court of the City of Richmond, Division I

On March 4, 1982, came the appellant, by counsel, and filed a motion praying that the court remand the transcript and objections thereto to the said circuit court for appropriate action and for other relief. Also came the appellant, by counsel, on March 19, 1982, and filed a motion for leave to proceed in forma pauperis.

On consideration whereof, it is ordered that the transcript and objections thereto be returned to the Circuit Court of the City of Richmond, Division I, for appropriate action and that the transcrip of the appellant's criminal trial in the said circuit court, in which final judgment was rendered on March 10, 1980, be made a part of the record in this case. It is further ordered that the appellant be permitted to proceed in forma pauperis on this appeal.

A Copy,

Teste:

Allen L. Lucy

Clerk

Order of October 5, 1982, by the Supreme Court of Virginia Denying Petition for Appeal.

# VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Tuesday *the* 5th *day of* October, 1982.

Linwood E. Briley, Appellant,

against Record No. 820509
Circuit Court No. A-1101-L/F-81-1519

J. P. Mitchell, Superintendent of the Virginia State Penitentiary, Appellee.

From the Circuit Court of the City of Richmond, Division I

Finding no reversible error in the judgment complained of, the court refuses the petition for appeal filed in the above-styled case.

And it is ordered that the Commonwealth recover of the appellant the costs in the court below.

A Copy,

Teste:

Allen L. Lucy, Clerk

By: Deputy Clerk

Pertinent Portions of Petition for Rehearing

IN THE

SUPREME COURT OF VIRGINIA

AT RICHMOND

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LINWOOD E. BRILEY,

Petitioner,

v.

J. P. MITCHELL,

Respondent

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PETITION FOR REHEARING

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TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF VIRGINIA:

Comes now your Petitioner, Linwood E. Briley, by counsel, and respectfully moves this Court for a rehearing of his Petition for Appeal pursuant to Rule 5:29 of the Supreme Court of Virginia and other authority, and states in support of his Petition for Rehearing the following:

At the time Petitioner was required by the Rules of this Court and by statutory authority to file his Petition for Appeal to this Court, the original trial transcript of his trial had not been included in the record submitted to this Court. Petitioner moved to have the original trial transcript be made a

part of the record and further moved for an extension of time; however, no extension of time was allowed, and the record was not, at the time Petitioner's Petition for Appeal was due, a part of the record before this Court. Accordingly, Petitioner could not in his original Petition for Appeal argue the merits of certain claims dismissed by the Circuit Court which merits rested wholly or in large part on the evidence found in the original trial transcript. However, pursuant to Petitioner's earlier motion, and subsequent to Petitioner's filing of his Petition for Appeal, this Court did, on March 25, 1982, order the original criminal trial record to be made a part of the record before this Court. Accordingly, it is only now for the first time that Petitioner has the opportunity to present legal argument pertaining to the merits of those claims which depended upon the original trial transcript.

## MATERIAL PROCEEDINGS BELOW

On February 21, 1980, Petitioner was convicted by a jury of capital murder during a robbery in violation of §18.2-31(D) of the Code of Virginia. On February 22, 1980, the jury recommended a sentence of death which was imposed by the Honorable William E. Spain on March 10, 1980. This Court affirmed in Briley v. Commonwealth, 221 Va 532 (1980). The United States Supreme Court denied Petitioner's Petition for a Writ of Certiorari on May 26, 1981, 451 U.S. 1031 (1981) (Brennan and Marshall, J.J., dissenting).

On October 15, 1981, Petitioner filed his Petition for

On October 5, 1982, this Court denied Petitioner his request for an appeal by Petition for Appeal filed March 17, 1982.

ASSIGNMENTS OF ERROR

In addition to those Assignments of Error set forth in Petitioner's original Petition for Appeal, Petitioner submits the following additional Assignments of Error in light of the inclusion at this stage of the original trial record in the record before this Court.

1. The court erred in dismissing Petitioner's claims pertaining to the invalidity of his sentencing by the jury, which claims are set forth in Claim I, paragraphs D and E; Claim II, paragraph I; and Claim III, paragraph R, the review of which claims was confined by the Circuit Court to the original record.

2. The court erred in dismissing Petitioner's claims pertaining to the constitution of his jury, involving such matters as voir dire and the excusal for cause of certain veniremen, which claims are set forth in Claim II, paragraphs A, B, and H, and the review of which claims was confined by the Circuit Court to the original record.

3. The court erred in dismissing Petitioner's claim that the defense was unconstitutionally prohibited from obtaining the juvenile record of Duncan Meekins, which claim is set forth in Claim III, paragraph D, the review of which claim was confined by the Circuit Court to the original record.

4. The court erred in dismissing Petitioner's claim that the trial court prejudiced his trial by making several comments

9. The court erred in dismissing Petitioner's claim pertaining to the misconduct of the prosecution which was made Claim VI of Petitioner's Petition for Writ of Habeas Corpus by Petitioner's Second Motion for Leave to Amend.

10. The court erred in dismissing Petitioner's Petition when, under the totality of the circumstances surrounding Petitioner's conviction and sentence, the conviction and sentence are seriously devoid of those safeguards which would insure a fair and reliable verdict, as set forth in the final paragraph of Claim VII of the Petition as amended.

## QUESTIONS PRESENTED

1. Is Petitioner's sentence of death constitutionally imposed when the original trial record reveals that the court instructed the jury that it did not have to be unanimous as to the criterion for imposing the sentence of death, when both criteria were presented to the jury for their sentencing, when the jury was never polled as to which criterion supported its sentence of death, when the polling even as to the sentence of death was inadequate, and when one of the two criteria was not even present in the case? Petitioner submits the answer is "no". This relates to Assignments of Error Nos. 1 and 10.

2. Are Petitioner's conviction and sentence constitutional when he was tried and sentenced by a jury from which every person who expressed any opposition to the death penalty was excluded without their ever being asked if they would nonetheless follow the law as instructed by the court, when certain other veniremen

meaningful closing argument or objection to both improper and incorrect argument by the Commonwealth, when they failed to pursue areas of mitigation and present meaningful argument at sentencing, when they failed to make timely objections to many erroneous rulings of the court and improper questioning by the Commonwealth, and when otherwise they failed to provide Petitioner with the legal expertise and advocacy to which he was entitled? Petitioner submits the answer is "no". This relates to Assignments of Error Nos. 6, 8, and 10.

8. Are Petitioner's conviction and sentence constitutional in light of the Commonwealth's Attorney's failure to disclose exculpatory information to the defense, his knowingly creating and otherwise allowing false impressions of evidence before the jury, and other actions of the prosecution including the intimidation of witnesses by the perjury charge brought against Petitioner's father during the pendency of Petitioner's case? Petitioner submits the answer is "no". This relates to Assignments of Error Nos. 9 and 10.

9. Are Petitioner's conviction and sentence constitutional when his trial and sentencing contained so many prejudical and unfair aspects that they were devoid of the necessary safeguards to assure Petitioner of a sure and reliable verdict, in violation of due process? Petitioner submits the answer is "no". This relates to Assignments of Error Nos. 1 through 10.

## STATEMENT OF FACTS

In February, 1980, Petitioner was tried for the capital

Order of December 3, 1982, by the Supreme Court of Virginia denying Petition for Rehearing.

# VIRGINIA:

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on* Friday *the* 3rd *day of* December, 1982.

Linwood E. Briley, Appellant,

against Record No. 820509
Circuit Court No. A-1101-L/F-81-1519

J. P. Mitchell, Superintendent, etc., Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 5th day of October, 1982, and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Allen L. Lucy
Clerk

Office-Supreme Court, U.S.
FILED
MAR 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-6284

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LINWOOD E. BRILEY,

Petitioner,

v.

J. P. MITCHELL, SUPERINTENDENT,

Respondent.

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# BRIEF IN OPPOSITION TO CERTIORARI

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## ARGUMENT AGAINST GRANTING CERTIORARI

I. The Questions Presented Are Not Properly Before This Court.

As Petitioner concedes (Petition, P. 5), the questions presented were not addressed by the Virginia Supreme Court on direct appeal. See Briley v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980). The Virginia Supreme Court adheres to a contemporaneous objection rule, and will not notice any error not objected to at trial and assigned as error on appeal. Rule 5:21, Rules of the S preme Court of Virginia. There can be no doubt that the questions presented in this petition were not raised at trial nor on direct appeal, and Petitioner does not contend otherwise.

When Petitioner filed his petition for a writ of habeas corpus in the state court, he raised these issues for the first time. Under Virginia law, an issue which could have been raised at trial and on appeal cannot be recognized in a petition for a writ of habeas corpus. Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974).

The order of the state habeas court entered on December 15, 1981 (Petition Appendix, pp. 8,9) would make it appear that the habeas court would entertain the questions presented. At the beginning of the plenary hearing, however, the Respondent requested the habeas court to reconsider its ruling and deny

those claims, including those presented in the present petition. which were not objected to at trial and not raised on direct appeal. The habeas court indicated that such issues could be raised only within the broad claim of ineffective assistance of counsel. (Habeas transcript of December 15, 1981, pp. 4-7 included in Appendix pp. 1-4). Respondent asserts that the habeas court did in fact refuse to entertain the questions now presented for the reason they had not been raised at the original trial and on direct appeal.

Furthermore, on appeal from the denial of the petition for a writ of habeas corpus, Petitioner did not raise these issues. Petitioner first raised these questions presented on a Petition for Rehearing. The Virginia Supreme Court will not consider issues raised for the first time on a Petition for Rehearing since such issues were not assigned as error. See Rule 5:21.

It is axiomatic that this Court will not consider issues which have not been decided by the highest court of the state. Cardinale v. Louisiana, 394 U.S. 437 (1969).

## II. The Jury Was Unequivocally Unanimous In Finding Both Aggravating Circumstances.

In instructing the jury at the penalty phase of the bifurcated proceeding, the trial court advised the jury that the Commonwealth must prove beyond a reasonable doubt at least one of the two statutory aggravating circumstances. The trial court observed that while part of the jury may believe one and part may believe the other aggravating circumstance, the jury had to be unanimous in finding an aggravated circumstance (Appendix p. 5). When the jury returned its verdict, the jury had found both of the aggravating circumstances, and upon polling the jury, they indicated the verdict was unanimous (Appendix p. 6-9).

In addition the trial court specifically made inquiry of the jury as to the finding of aggravating circumstances. The jury unequivocally stated that it had been unanimous in finding both aggravating circumstances (Appendix p. 9).

To maintain that an ambiguity exists concerning whether the jury was unanimous in finding both aggravating circumstances is to ignore the record.

Petitioner's reliance upon Godfrey v. Georgia, 446 U.S. 420 (1980), is misplaced. The victims in Godfrey were killed instantly whereas in the present case Petitioner's victim was forced to experience the horror of waiting for his execution. See James Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980). Additionally, the Virginia Supreme Court has limited the scope of the "vileness" aggravating circumstance, see Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), and has consistently applied its criteria when reviewing the record to determine that the evidence supported a finding of the aggravating circumstance.

## CONCLUSION

For the reasons stated, the Respondent submits that the Petition for Certiorari should be denied.

Respectfully submitted,

J. P. MITCHELL

By James E. Kulp
Counsel

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Richmond, Virginia 23219
(804) 786-6565

## CERTIFICATE OF SERVICE

I, James E. Kulp, a member of the Bar of the United States Supreme Court, do certify that on March 24, 1982, I caused this Brief In Opposition to be deposited in the United States Post Office or mailbox, first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2.

I further certify that a copy of this Brief In Opposition was mailed, first class postage prepaid, to Deborah C. Wyatt, Esquire, 917 East Jefferson Street, Charlottesville, Virginia 22901, counsel for Petitioner.

James E. Kulp
Senior Assistant Attornye General

COMMONWEALTH OF VIRGINIA,

CITY OF RICHMOND, to-wit:

The foregoing certificate was subscribed and sworn to before me by James E. Kulp this 24th day of March, 1983.

My commission expires: March 25, 1985

Marian N. Schumpf
Notary Public

at the bottom where it actually says, Claim V all paragraphs. I believe it should be, Claim VI for Number 6.

THE COURT: Okay.

MR. KULP: If it please the Court, on that order that the Court is looking at, setting out the claims that the Court has ruled on, I would ask the Court -- I think the order sets forth precisely what the Court said on November 18, and I have endorsed the order. I would ask the Court to reconsider some of the allegations based on the pleading filed by the respondent, based on the case of Slayton versus Parrigan, 215 Va., where the Supreme Court of Virginia has made it clear from reading Number 29 of the opinion which says that the petitioner for the writ of the habeas may not plead for suit of appeal or writ of error. In that case, the court held that since the issue of identification could have been raised at the trial and on appeal, that it could not, the petitioner did not have standing to raise that on petition or a writ of habeas corpus. I filed that in answer to a number of the claims, Paragraph 13, Subparagraphs D and E, Paragraph 14, A, B, E, F, G, H, and I, Paragraph 15, A, B, C, D, E, G, H, L, M, N, O, P, Q, R, S, T --

THE COURT: Where are you reading?

MR. KULP: These are the paragraphs.

THE COURT: What paper are you reading from?

MR. KULP: That is just a little note that I made, Your Honor.

THE COURT: What order are you reading this note from?

MR. KULP: The order is the one on the top where it says, on November 18, 1981, came the respondent, and it sets out a number of different paragraphs and rulings.

THE COURT: Is that the order on top?

MR. KULP: Yes, sir.

THE COURT: And, in answer to that is the following, which shall be addressed by the Court, that the following shall be denied for the reasons having been decided by the Virginia Supreme Court on appeal from the trial decision: Claim 1, Paragraphs B and C; Claim 2, Paragraphs C, D, E, F, and G; Claim 3, Paragraphs A, F, G, I, J, K, L, M, N, O, P, Q, S, T. Is that right?

MR. KULP: Yes, sir.

THE COURT: And, it is further ordered that the following claims, Claims -- Claim 3,

Paragraphs B, E, and H; right?

MR. KULP: Yes, sir.

THE COURT: It is further ordered that Paragraph A of Claim 1 is denied on the merits. It is further ordered that Claim V does not extend to reflection, in effect, because of the failure which counsel raised this claim in the trial on appeal. It says, it is further ordered that Claim V -- Is that supposed to be Claim 6?

MRS. WYATT: Your Honor, I believe Mr. Kulp and I do agree to that, that it was supposed to be Claim 6.

THE COURT: If I change 6, I have got to handle --

MRS. WYATT: It is further ordered that Claim 3 is denied. That is addressing Claim 3, Claim V, and consequently at the bottom of the order where it says, Claim V, again that should have been -- that is a separate --

THE COURT: Oh, all paragraphs, Claim V is denied, except for reflection.

It looks like there are only two issues for me to decide.

MR. KULP: All I am asking the Court to do -- I think we understand and I think the order

correctly reflects what occurred. I am simply asking the Court to amend the order to reflect that the claims you see down at the bottom of the first page, Paragraphs D and E --

THE COURT: Yes.

MR. KULP: The respondent raised the issue in its pleading that those issues could have been raised at the trial on appeal and cannot be raised on the habeas corpus under Slayton versus Parrigan. I would ask the Court to make such a ruling on those various claims, that I would be willing to state for the record in addition to, you know, all the other rulings the Court has made.

THE COURT: Well, I think the only reason that would be admissible in evidence is the fact that in the broad claim of ineffective assistance --

MR. KULP: We are not contesting that, but the claims for --

THE COURT: We are not? Constitutionally, you cannot raise any habeas corpus --

MR. KULP: I want to make that clear for the record, so there will be no mistake when it goes someplace further.

THE COURT: Well, it is clear in my mind.

MR. KULP: We want to be clear for the

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hearing resumes, viz:

THE COURT: Good morning, members of the jury.

NOTE: The jury answers, good morning.

THE COURT: Members of the jury, (Reading) "You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives: --" Now, let me state to you: Of these two alternatives, part of you may believe one, part of you may believe another, but at least all twelve of you must believe one or the other.

(Reading) "First, that, after consideration of his past criminal record, there is a probability that he would commit acts of violence that would constitute a continuing serious threat to society; or, two, that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of

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(To the jury) Ladies and gentlemen, you will now go to your room on the penalty phase of this case. You will take with you the instructions of the Court and the exhibits.

You have a form of verdict attached -- forms of verdicts attached at the end of the instructions. Today there are only four instructions, so the fifth sheet here will be the verdict forms.

You will take these certified copies of the orders of the Circuit Court of the City of Richmond, Division I.

When you have reached a verdict, if you will knock at your door, one of the Deputy Sheriffs will be right outside to receive you.

THE SHERIFF: (To the jury) Come with me, please.

NOTE: At this point, 11:15 o'clock a.m., the jury go into the jury room. The jury knock at the door at 1:12 o'clock p.m. At 1:15 o'clock p.m., the Court and counsel being present, the jury return to the courtroom.

THE COURT: Ladies and gentlemen of the jury, have you reached a verdict?

FOREMAN BIBB: Yes, Your Honor, we have

THE COURT: Is the verdict unanimous?

FOREMAN BIBB: Yes, sir.

THE COURT: So say you all?

NOTE: The jurors answer affirmatively.

THE COURT: Hand the verdict to the Sheriff.

NOTE: The jury foreman hands the verdict to the Sheriff who, in turn, hands same to the Court.

THE COURT: I again remind you that we will not tolerate any display of any sort.

(Reading the verdict) We the jury, on the issue joined, having found the defendant guilty of capital murder of John Harvey Gallaher during the commission of robbery, while armed with a deadly weapon and having found that, after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society and his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind; aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in

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mitigation of the offense, unanimously fix his punishment at death. Signed: Charles L. Bibb, Foreman, dated 2-22-80.

Poll the jury, Mr. Clerk.

THE CLERK: Ladies and gentlemen of the jury, if this be the verdict of each of you, please raise your right hand as your name is called.

Barbara B. Smith.

NOTE: Ms. Smith raises her hand.

THE CLERK: Hattie P. Burgess.

NOTE: Ms. Burgess raises her hand.

THE CLERK: Thomas Quarles.

NOTE: Mr. Quarles raises his hand.

THE CLERK: Herbert L. Pryor.

MR. PRYOR: Here. (Raising hand)

THE CLERK: Jasper Hunter, Sr.

NOTE: Mr. Hunter raises his hand.

THE CLERK: Charles L. Bibb.

NOTE: Mr. Bibb raises his hand.

THE CLERK: Lucille W. Mitchell.

NOTE: Ms. Mitchell raises her hand.

THE CLERK: Bessie W. Hargrove.

NOTE: Ms. Hargrove raises her hand.

THE CLERK: Anne E. Harris.

NOTE: Ms. Harris raises her hand.

THE CLERK: Mildred A. Andrews.

NOTE: Ms. Andrews raises her hand.

THE CLERK: Edward J. Davis, Sr.

NOTE: Mr. Davis raises his hand.

THE CLERK: Mabel Dunn.

NOTE: Ms. Dunn raises her hand.

THE COURT: All right. The record will show that from the polling of the jury, that they all indicated by raising their hand that it was unanimous.

And I noticed, Mr. Foreman, by striking out an "or" -- as between the two circumstances you must find, you struck out the word "or" which, I take it, to mean that you all not only were unanimous in the final verdict, but were unanimous in finding the two lawful provisions that you must find in order to impose a death sentence, is that correct?

FOREMAN BIBB: Yes, sir.

THE COURT: So say you all?

NOTE: The members of the jury answer affirmatively.

THE COURT: Ladies and gentlemen of the jury, the Court wishes to -- I never condemn and I never criticize a jury, but I do wish to tell you